No. 71-469

In the Supreme Court of the United States

OCTOBER TERM, 1971

A. B. HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. After a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted on two counts of securities fraud and on two counts of mail fraud, in violation of 15 U.S.C. 77q(a) and 18 U.S.C. 1341, respectively, but acquitted of conspiring to violate the same statutes in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent terms of imprisonment for three years on both of the securities counts and on one of the mail fraud counts. Sentence on the other mail fraud count was suspended. The court of appeals affirmed (Pet. App. A).

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The essential facts are not in dispute and are set forth in the opinion of the court of appeals (Pet. App. A 2–5). They show that in 1963, one Dombowsky and two others incorporated Shoppers Charge Plan, Inc. to issue personal credit cards, purchase the credit card charge slips from participating stores, and bill cardholders accordingly. In 1966, petitioner and co-defendant Swaving became associated with Shoppers Charge (Tr. 484.) Petitioner assumed the title of "Business Manager" and Swaving was the "Account Executive." Petitioner, Swaving and Dombowsky were all active in selling demand notes, which were used to finance Shoppers Charge operations, as well as in soliciting new stores to join the credit plan. Approximately $400,000 of the $500,000 raised by the corporation between 1963 and 1966, was raised in 1966 during petitioner's association with Shoppers Charge (Tr. 825–826). The evidence showed that the corporation was at all times insolvent during its operation and that only isolated interest payments were made to investors. Only a few investors ever received back any of their principal investment.

In March 1966, the North Dakota Commissioner of Securities commenced an investigation of Shoppers Charge with respect to its sales of short-term promissory notes. The Commissioner determined that these notes constituted securities and that their sale without state registration was unlawful. The evidence showed that petitioner was fully aware of the Commissioner's investigation of Shoppers Charge and that he had knowledge of the company's financial condition. Peti-

tioner, nevertheless, represented throughout most of 1966 that the company was in good financial condition and that the purchase of its notes was a good investment. Petitioner's first sales of securities in Shoppers Charge occurred at least as early as February 1966 (Tr. 681); he continued to make sales through November 1966 (Tr. 579).

2. In December 1966, Shoppers Charge was absorbed by SCP Credit Card Corporation (Tr. 150). The Board of Directors of SCP relieved Dombowsky of his duties in February 1968 at which time Dombowsky admitted to the board that he had defrauded investors and had embezzled funds from Shoppers Charge (Tr. 154). Also in 1968, Swaving boasted to the SCP board "that, while he was crooked, he was too smart to be caught; that his name would not be found on any legal documents and that there wasn't any evidence that anybody would get against him" (Tr. 159). When evidence of this statement was introduced at trial, petitioner failed to object or request that it be limited to Swaving (Tr. 159).

Petitioner contends that since Dombowsky's and Swaving's statements were not made in the course of and in furtherance of the scheme to defraud, they should not have been admitted in evidence. Although the trial court did not limit the applicability of this testimony, it did charge the jury that if a common scheme were found, statements by coadventurers could be considered

> • • • provided such acts and statements were knowingly done and made during the continu-

> ance of such common plan and in furtherance of an object or purpose of the plan.
>
> Otherwise any admission or incriminatory statement made outside of court by one person may not be considered as evidence against any person who was not present and heard the statement made. [Tr. 1090.]

Under the circumstances, since petitioner was not mentioned nor referred to in either statement and since the jury actually acquitted petitioner of conspiracy, the failure to exclude or limit the testimony, even if error, was harmless. Moreover, Dombowsky's statement was consistent with petitioner's defense, which asserted that Dombowsky was the true culprit (Tr. 916).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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